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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL MANUEL VELEZ, Defendant and Appellant.	E035232 (Super.Ct.No. FWV025459) OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed in part; sentence stayed in part.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Angela M. Borzachillo, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Michael Manuel Velez appeals from his conviction of five felony counts and related enhancements. On appeal, he contends that (1) the trial court erred in failing to grant a new trial as to all counts on the ground of juror misconduct during deliberations; (2) the trial court erred in failing to make further inquiry into whether jurors had committed misconduct by violating the court's jury deliberation instruction; (3) the evidence was insufficient to support the conviction of attempted first degree automated teller machine robbery as to victim Renee Arriaga; (4) the attempted murder convictions must be reversed because the jury instructions omitted the essential element of a specific intent to kill a particular alleged victim; (5) the attempted murder convictions must be reversed because the jury was instructed on the erroneous theory of implied malice; and (6) Penal Code[1] section 654 prohibits multiple punishments for shooting at an occupied vehicle and attempted murder when the crimes were committed by a single act, and the shooting was a means of committing the attempted murder.

The People concede that section 654 prohibits multiple punishments for the convictions of shooting at an occupied vehicle and attempted murder. In all other respects, we affirm the conviction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A jury found defendant guilty of two counts of kidnapping for carjacking (counts 1 & 2), one count of robbery (count 3), and one count of attempted robbery (count 4), two

[1] All further statutory references are to the Penal Code unless otherwise specified.

counts of willful, deliberate, and premeditated attempted murder (counts 5 & 6), shooting at an occupied vehicle (count 7), and two counts of attempted first degree automated teller machine robbery (counts 8 & 9). The jury found true the allegations that defendant personally used a firearm in connection with counts 5 through 9, but found not true the same allegation as to counts 1 through 4. The jury also found true an allegation of personal discharge of a firearm with great bodily injury with respect to count 5.

The court granted defendant's motion for a new trial on the basis of juror misconduct with respect to counts 1 through 4, but denied the motion as to the remaining counts. The court sentenced defendant to consecutive life terms for counts count 5 and 6, a consecutive 25-year-to-life term for personal discharge of a firearm causing great bodily injury with respect to count 5, a consecutive 20-year term for gun use as to count 6, and consecutive 26-year and 4-month determinate terms for counts 7, 8, and 9. After sentencing, the court dismissed counts 1 through 4 at the request of the People.

Counts 1 through 4.

Because counts 1 through 4 (hereinafter sometimes referred to as the Montclair counts) were dismissed and are not directly the subject of any arguments on appeal, the evidence concerning those counts will be discussed only briefly. In the evening of May 31, 2002, defendant entered Miguel Becerra's car when it was stopped at a red light in Montclair. Defendant pointed a gun at Becerra's head and asked him for money. When Becerra said he had none, defendant told him to drive, and Becerra drove for a few minutes and stopped the car. Defendant ordered Becerra and his passenger, Marianna Guzman, out of the car and fired two shots into the air. Defendant took Becerra's wallet,

which contained an automated teller machine (ATM) card. Defendant demanded the PIN for the card, and Becerra gave defendant a false PIN. Defendant fired more shots and left in another car that had pulled up.

Counts 5 through 9 (sometimes referred to hereafter as the Upland counts).

Shortly after the kidnapping of Becerra and Guzman and robbery of Becerra were reported to the police, defendant walked up to an ATM machine at a bank about seven miles from where he had taken Becerra's ATM card. Defendant attempted unsuccessfully several times to use the card to withdraw cash; however, the ATM rejected the transactions because of an invalid PIN. The ATM's videotape of the attempted transactions was played to the jury. The videotape showed that the person using the ATM had a cross incised or branded on his right forearm, and he attempted to conceal his left hand by wrapping it in his shirt.

Meanwhile, James Waite and his girlfriend, Renee Arriaga, arrived at the bank, with Waite driving Arriaga's car. From a distance of about 15 feet, they waited in the car and watched while defendant was at the ATM. Arriaga thought it was suspicious that someone on foot was using the drive-through ATM at night. Defendant left the ATM and walked past their car on the passenger side, making eye contact with Arriaga, and then walked away out of sight. Waite withdrew $20 at the ATM machine and put the ATM card, the receipt, and the money on the center console of the car. He and Arriaga then saw defendant standing about 15 feet in front of the car holding a gun, blocking their exit. Waite accelerated, and when he saw defendant raise his left arm (the arm holding the gun), Waite jerked the wheel to the left to try to hit defendant. The car hit defendant on

the left leg, and defendant's left palm hit the hood of the car. Defendant fired five or six shots at the car; one shot shattered the back windshield, and the last shot hit Arriaga in the head. A bullet fragment was removed from Arriaga's forehead at the hospital, requiring stitches, and she suffered from panic and headaches afterward.

Defendant was arrested several days later, and Arriaga identified him from a photographic lineup; however Waite did not identify defendant's photograph. The .22-caliber bullet casings found at the bank crime scene had been fired from the same gun as that used in the Becerra robbery. A .22-caliber round of the same brand as those used in the Upland and Montclair crimes was found in the trunk of defendant's car.

When defendant was arrested, he had a freshly made (i.e., still red and scabbed) spider web tattoo over the branding mark of a cross on his right arm, although the branding mark was still visible. A shoe box containing several homemade tattooing devices was found during a search of defendant's house. Defendant also had a tattoo on his left forearm that said, "Velez." Defendant did not have a mustache when he was arrested. A coworker testified that Velez had worn a mustache at work on May 31. The next time she saw him, he had shaved his head and mustache and had pierced one of his ears.

A criminalist lifted a partial palmprint from the hood of Arriaga's car. The criminalist matched the palmprint to defendant's left hand.

III. DISCUSSION

A. Failure to Grant New Trial on Ground of Juror Misconduct

Defendant argues that the trial court committed prejudicial error in failing to grant a new trial on all counts because of juror misconduct during deliberations. Several days after the jury entered verdicts, defense counsel informed the court of possible juror misconduct. The court conducted a hearing at which defendant's wife testified that she had heard one juror laughingly say to another in the hallway, while deliberations were still ongoing, "Those poor parents, I can't believe they actually think that, you know, their son is still innocent."

The trial court called the jury foreperson to testify. She stated that she was unaware of the incident that defendant's wife had described, and there had never been any indication that the jurors had made up their minds before deliberations began.

The trial court then called the other 11 jurors. Eight jurors testified that they were not aware of any conversations about the case among jurors outside the jury room. However, juror No. 6 testified that during a break in deliberations, she and juror No. 12 had agreed that they did not believe a carjacking had taken place. Juror No. 2, who was also present, had said he thought the crime had occurred. The court stated that it only wanted information about the conversation that had taken place in the hallway, and juror No. 6 testified that the conversation with jurors No. 2 and 12 had taken place outside the building. Juror No. 6 testified that she had eventually changed her decision after considering the evidence, but that the conversation outside the jury room had not had any impact on her vote.

When juror No. 12 was questioned about the conversation, she testified that she and jurors No. 2 and 6 had had a conversation outside during deliberations. She then stated, "We were outside during – having a cigarette and there was a compromise made on Friday." The court stated that it did not want to hear about what had been said in the jury room, but only about what had occurred outside. Juror No. 12 acknowledged that she had told juror No. 2 that she did not think a carjacking had taken place because one of the victims, Marianna Guzman, was not a credible witness. Juror No. 6 had agreed. Juror No. 12 described the conversation as follows: "And he goes – I said I can't see anyone being – just clamming up like that, being that stupid. It seems like she's clamming up or she can't get the story straight so she's just shutting up because —

"THE COURT: You mean the female victim?

"JUROR NO. 12: The female victim, Marianna Guzman. She just seemed like she clammed up because she was getting their story all screwed up or something. It didn't make sense. And I go, you know, but – and (Juror No. 2) said, well, you know, he started making – he goes, you know, I just can't – there's no way. I go, it's going to have to be proven to me. They're going to have to try to change my mind. I go, we're going to be hung, you know. And (Juror No. 6) agreed and agreed and it – then we got into the jury --" Juror No. 2 then stated to jurors No. 6 and 12 that he "deal[t] with stupid kids all day long," and "[t]hese people, they can be like that." Juror No. 12 told juror No. 2, "[L]ook at the picture. They weren't dressed for Olive Garden. Look, their hair's messed up. It looks like they just got out of the back of a car, but, you know -- . . . ." Juror No. 12 testified that the conversation "could have" affected her verdict.

After the court excused juror No. 12 and told her not to be worried about what she had done, she stated, "I'm not. I'm not. We tried to – we tried to locate you. We said let her know because it didn't sit right with me and, you know, I, honest to God, I tried to look it up in the phone book. (Juror No. 6) and I said there was a compromise that we negotiated on the last--" The court again admonished her that it did not want to hear about what had happened during deliberations.

Juror No. 2 testified about a conversation in which an alternate juror had stated that Guzman was ignorant, and jurors No. 6 and 12 were present. Juror No. 2 did not say anything in response to the alternate juror's statement, but he had nodded his head. The conversation did not affect his verdict. Juror No. 2 believed the conversation had taken place before deliberations began.

The trial court permitted defense counsel to file a written motion for a new trial and scheduled a hearing concurrent with sentencing. Defense counsel thereupon filed the motion alleging juror misconduct.

At the hearing on the motion, defense counsel argued that although the jurors had reported inappropriate discussions of counts 1 through 4, the whole of the deliberations had been tainted, and all counts should be dismissed. She further argued that the jurors had "compromised somehow" and requested the court to conduct further investigation. The trial court stated that it would be inappropriate to delve into the jurors' thought processes during deliberations.

The court found that juror misconduct had occurred, and the People had not rebutted the presumption of prejudice arising from juror misconduct as to the Montclair

counts. However, the jurors' conversation had concerned only the Montclair counts, and because the Upland crimes had involved separate acts at a different time and location from the Montclair counts, there was no basis to believe that the misconduct had tainted the verdicts as to the Upland counts. The court granted defendant's motion for a new trial as to the Montclair counts but denied the motion as to the Upland counts.

The court also denied the request for a further investigation into a possible compromise jury verdict, stating that it could not accept evidence of the mental processes of the jurors. The court further explained its ruling: "And with respect to this possible compromise that may have occurred, it appears to the court what did occur is that apparently with respect to Counts 1 through 4, they found guilty verdicts, remembering that somebody talked about giving up a not guilty conviction based upon or conviction they were not guilty based upon the discussions that [defense counsel] indicated in the transcript. And what happened, obviously, in 1 through 4 is all the special allegations regarding use of a firearm and regarding 12022.53(b) of the Penal Code were found not true as to the Montclair counts, but they were all found true with respect to the Upland counts, which are the remaining counts, 5 through 9."

A new trial may be granted on the basis of jury misconduct. (§ 1181, subds. (2) & (3).) However, a motion for new trial is addressed to the sound discretion of the trial court, whose ruling will not be disturbed in the absence of a clear showing of abuse of discretion. (*People v. Williams* (1988) 45 Cal.3d 1268, 1318, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558.) This court must "'accept the trial

court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 195.)

Jury misconduct gives rise to a rebuttable presumption of prejudice. (*People v. Majors* (1998) 18 Cal.4th 385, 417; *People v. Marshall* (1990) 50 Cal.3d 907, 949.) The presumption may be rebutted "by a showing that no prejudice actually occurred," (*People v. Williams* (1988) 44 Cal.3d 1127, 1156) "or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm" (*In re Carpenter* (1995) 9 Cal.4th 634, 653, italics and internal quotation marks omitted). We may consider the strength of the prosecution's case in determining if juror misconduct was prejudicial. (*People v. Cochran* (1998) 62 Cal.App.4th 826, 831.)

Here, none of the reported conversations addressed the Upland crimes. Moreover, the evidence against defendant in connection with the Upland crimes was overwhelming. Arriaga picked defendant's photograph out of a photographic lineup, and both Arriaga and Waite identified him at trial. His palmprint was found on the hood of Arriaga's car. In addition, the videotape from the security camera at the ATM showed a cross branded the forearm of the man attempting to use Becerra's ATM card. Defendant later tried to conceal the cross branded or incised on his forearm with a homemade tattoo, and he also attempted to change his appearance by shaving his mustache and piercing his ear. Defendant's car contained bullets of the same brand as were fired at Arriaga and Waite.

We conclude that in light of the entire record, the trial court did not abuse its discretion in determining that the juror misconduct was not prejudicial as to counts 5 through 9.

B. Failure to Inquire into Juror Misconduct

Defendant next argues that the trial court erred by failing to inquire into further jury misconduct when jurors mentioned a possible compromise verdict.

The trial court has discretion whether to conduct an evidentiary hearing on allegations made in a motion for new trial. (*People v. Brown* (2003) 31 Cal.4th 518, 582.) "'[T]he defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact.' [Citation.]" (*Id.* at p. 581.) The trial court's ruling on the motion for new trial will not be disturbed in the absence of an abuse of that discretion. (*People v. Williams*, *supra*, 45 Cal.3d at p. 1318.)

When a party seeks a new trial based upon jury misconduct, the court must first determine whether the evidence presented is admissible. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112.) Here, the court determined that the evidence would be inadmissible because it impermissibly went to the jurors' mental processes.

Evidence Code section 1150 provides, "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental

processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

In *People v. Hedgecock* (1990) 51 Cal.3d 395, the court emphasized that Evidence Code section 1150 may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations. In rare circumstances, a statement made by a juror during deliberations might itself be an act of misconduct, and if so, evidence of that statement is admissible. However, when a juror gives the reasons during deliberations for his or her vote, the words reflect the juror's mental processes and are inadmissible. Thus, evidence of such statements of reasons is inadmissible under Evidence Code section 1150. (*Hedgecock,* at pp. 418-419.)

In *People v. Peavey* (1981) 126 Cal.App.3d 44, a juror stated that she believed the defendant was not guilty, but she voted guilty because the rest of the jurors had done so. The court found that her statement demonstrated her mental processes and the subjective considerations that influenced her vote, and as such, were inadmissible. (*Id.* at p. 51.)

In *People v. Root* (1952) 112 Cal.App.2d 122, the defendant claimed that the verdict against him had resulted from a compromise. On his motion for new trial, he submitted affidavits of jurors stating that those who had voted not guilty had been persuaded to change their vote to guilty on one count, and other jurors had changed their votes to not guilty on three other counts. However, on appeal, the defendant conceded that he could not impeach the jury verdict in this manner.

In *People v. Stevenson* (1970) 4 Cal.App.3d 443, the defendant sought to admit juror affidavits stating that the jurors had reached their verdict by compromise. The court found the affidavits inadmissible because they showed only the mental processes of the respective jurors and the subjective considerations that influenced their verdicts. Because there was no admissible evidence that any of the jurors had surrendered their conscientious convictions on a material point or had reached their verdict by compromise, the court held that the trial court had properly denied the defendant's motion for new trial.

Here, the mention of a possible compromise went to the jurors' mental processes and was therefore inadmissible to impeach the verdict. We conclude the trial court did not abuse its discretion in denying the motion for a further hearing on juror misconduct.

C. Sufficiency of Evidence of Attempted First Degree ATM Robbery

Defendant argues that the evidence was insufficient to establish attempted first degree ATM robbery of Arriaga because Arriaga never used the ATM.

Section 212.5, subdivision (b) provides: "Every robbery of any person while using an automated teller machine or immediately after the person has used an automated teller machine and is in the vicinity of the automated teller machine is robbery of the first degree." ATM robberies are subject to greater punishment so as to deter such crimes. (*People v. Ervin* (1997) 53 Cal.App.4th 1323, 1331.) Here, defendant was convicted of *attempted* ATM robbery. "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done towards its commission." (§ 21a.)

Defendant contends that because Arriaga never used or attempted to use the ATM, defendant could not be convicted of attempted ATM robbery of Arriaga merely because she was present when Waite used the ATM. However, when a defendant has the requisite criminal intent, but the elements of the substantive crime are lacking because of circumstances unknown to the defendant, he or she can be convicted of attempt. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

Here, after attempting unsuccessfully to use the ATM card he had stolen from Becerra, defendant left the ATM machine, walking by the car in which Waite and Arriaga were waiting, and staring into the car. Defendant disappeared from sight, and Waite drove the car up to the ATM machine and withdrew cash which he put on the console of the car. Defendant then emerged in front of the car, holding a gun. This substantial evidence supported the jury's finding that defendant possessed the specific intent to commit robbery of both Waite and Arriaga.

The fact that Arriaga had not personally used the ATM was unknown to defendant, and factual impossibility is not a defense to a charge of attempt. (*People v. Reed* (1996) 53 Cal.App.4th 389, 396 ("There need be no '"present ability" to complete the crime, nor is it necessary that the crime be factually possible.' [Citation.]".) Factual impossibility occurs when the objective of the defendant's conduct is proscribed by the criminal law, but a circumstance unknown to the actor prevents him or her from bringing about that objective. (*People v. Peppars* (1983) 140 Cal.App.3d 677, 687, fn. 5.) Here, even though the ATM robbery of Arriaga was factually impossible, the jury could

reasonably conclude that defendant *attempted* the ATM robbery of Arriaga as well as Waite, and the evidence was sufficient to support that conviction.

D. Jury Instructions on Attempted Murder

Defendant contends that his convictions of attempted murder must be reversed because the jury instructions omitted the essential element of specific intent to kill a particular victim.

1. Waiver

The People contend that any error in the jury instructions on attempted murder was waived because defendant failed to request an amplification of the instructions or to object to the instructions given. Defendant contends, however, that the issue is whether the jury was properly instructed on an element of the crime, and due process requires the trial court to instruct the jury sua sponte on every element of the charged offense. (See *People v. Flood* (1998) 18 Cal.4th 470, 480-481.) We conclude that there was no waiver. (§ 1259.)

2. Adequacy of Instructions Given

In *People v. Bland* (2002) 28 Cal.4th 313, the Supreme Court stated, "The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice – a conscious disregard for life – suffices. (*People v. Lasko* (2000) 23 Cal.4th 101, 107 [96 Cal.Rptr.2d 441, 999 P.2d 666].) But over a century ago, we made clear that implied malice cannot support a conviction of an *attempt* to commit murder. '"To constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend."

[Citation.] "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder." [Citation.]' [Citations.]" (*People v. Bland*, *supra*, 28 Cal.4th at pp. 327-328.) The court in *Bland* concluded that the transferred intent doctrine does not apply to attempted murder, and a defendant's "guilt of attempted murder must be judged separately as to each alleged victim." (*Id.* at p. 331, fn. omitted.)

The court in *Bland* further concluded, however, that a defendant may have a concurrent intent to kill multiple persons. The defendant was convicted of murdering Wilson, a member of a rival gang, and attempted murder of two other persons who had been passengers in the murder victim's car. The court held that the "[e]ven if the jury found that defendant primarily wanted to kill Wilson rather than Wilson's passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*People v. Bland*, *supra*, 28 Cal.4th at pp. 330-331, fn. omitted.)

Similarly, in *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565, the court affirmed the defendants' convictions of 11 counts of attempted murder when they shot at two occupied houses. The court explained, "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their

victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*Id.* at pp. 563-564.)

In *Bland*, the court stated, "This concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*People v. Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.)

Thus, a defendant may have the intent to kill multiple victims when he or she employs means that create a zone of harm, and the factfinder can reasonably infer that the defendant intended harm to all persons within that zone. (*People v. Bland*, *supra*, 28 Cal.4th at p. 330; *People v. Vang*, *supra*, 87 Cal.App.4th at pp. 563-565.)

In *People v. Chinchilla* (1997) 52 Cal.App.4th 683, the defendant was convicted of two counts of attempted murder based on firing a single shot at two police officers. (*Id.* at p. 688.) On appeal, he claimed that the evidence was insufficient to support both convictions because the doctrine of transferred intent did not apply to attempted murder. (*Ibid.*) The court agreed that the doctrine of transferred intent did not apply, but the jury had not been instructed on that doctrine. Rather, the jury had been properly instructed under CALJIC No. 8.66 to independently evaluate whether the defendant possessed the requisite intent to kill as to both officers. (*Id.* at p. 689.) Thus, the court affirmed the conviction.

Here, as in *Chinchilla*, the jury was not instructed on the transferred intent doctrine and was properly instructed with CALJIC No. 8.66.[2] Although the issue in *Chinchilla* was the sufficiency of the evidence to support the conviction, our conclusion is the same. There was no error in the instructions.

Moreover, the theory of transferred intent was never argued to the jury – rather, the deputy district attorney repeatedly emphasized in her argument that defendant had attempted to kill both Waite and Arriaga: "So with the attempted murder charge, you have an attempted murder against Renee and you have an attempted murder with James. . . . [¶] Attempted murder is a direct but ineffectual act done by the defendant towards killing Renee and James. . . . [¶] . . . [¶] Defendant had the express malice aforethought, namely, a specific intent to kill. Now, the facts show that at the time the defendant tried to kill James and Renee, he was mad at them; right." Thus, there is no reasonable probability that the jury misapplied the instructions given to find defendant guilty without a showing of specific intent as to each victim of attempted murder.

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[2] As read to the jury, the instruction provided in pertinent part as follows: "Defendant is accused in Counts 5 and 6 of having committed the crime of attempted murder, in violation of section 664 and 187 of the Penal Code. Every person who attempts to murder another human being is guilty of a violation of section 664 and 187. [¶] Murder is the unlawful killing of a human being with malice aforethought. In order to prove murder – attempted murder, I'm sorry, each of the following elements must be proved: [¶] Number one, a direct but ineffectual act was done by one person towards killing another human being; [¶] And, number two, the person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being. . . ."

E. Jury Instructions on Implied Malice

Defendant contends that his attempted murder convictions must be reversed because the jury was improperly instructed on the theory of implied malice. The jury was instructed on malice under CALJIC No. 8.11.[3]

A trial court must instruct the jury that the crime of attempted murder requires proof of the specific intent to kill. (*People v. Guerra* (1985) 40 Cal.3d 377, 386.) Here, as noted above, the jury was instructed with CALJIC No. 8.66, which stated the intent element of the crime of attempted murder as follows: "number two, the person committing the act harbored *express malice aforethought, namely, a specific intent to kill* unlawfully another human being." The jury was also instructed with CALJIC No. 8.67.[4] Thus, the jury was properly instructed that it was required to find express malice to convict defendant of attempted murder.

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[3] CALJIC No. 8.11 provides as follows: "'Malice' may be either express or implied. [¶] [Malice is express when there is manifested an intention unlawfully to kill a human being.] [¶] [Malice is implied when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.] [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

[4] CALJIC No. 8.67 provides as follows: "It is also alleged in [Count[s] 5 and 6 that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. [¶] 'Willful' means intentional. 'Deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. 'Premeditated' means considered beforehand."

Defendant argues, however, that the jury instructions on malice aforethought included a definition of implied malice, and the jury could have applied that definition to the attempted murder count. Because the court and the parties agreed that the jury should be instructed on the lesser included offense of attempted voluntary manslaughter, which would have required a finding that defendant acted with the knowledge of the danger to and with conscious disregard for human life, the instruction on implied malice was properly given. However, nothing in the instructions directed the jury to apply that instruction to the attempted murder counts. Rather, as noted, the instruction on attempted murder unequivocally directed the jury that it was required to find "express malice aforethought" and a "specific intent to kill" before it could convict defendant on those counts. In addition, the jury was instructed with CALJIC No. 3.31.5 as follows: "In the crimes charged in Counts 5 and 6, and attempted voluntary manslaughter, which is a lesser crime thereto, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed. [¶] The mental states required are included in the definitions of the crimes set forth elsewhere in these instructions." Thus, there is no reasonable probability that the jury misapplied the implied malice instruction to the attempted murder counts.

Defendant relies on *People v. Guerra*, *supra*, 40 Cal.3d 377 for the proposition that the instructions given permitted the jury to convict him of attempted murder based on an implied malice theory. In *Guerra*, the court instructed the jury on "attempt" and on three theories of murder: express malice, implied malice, and felony murder. However,

the court failed to instruct the jury that attempted murder required a specific intent to kill, a mental state coincident with express malice, but not necessarily with implied malice or felony murder.

Here, the trial court explicitly instructed the jury that attempted murder required "express malice aforethought, namely, a specific intent to kill . . . ." Thus, *Guerra* is distinguishable on its facts and does not support defendant's argument.

Defendant also relies on *People v. Swain* (1996) 12 Cal.4th 593, in which the Supreme Court reversed the defendants' conviction of conspiracy to commit murder. The court held that "intent to kill is a required element of the crime of conspiracy," and "[i]n light of the jury instructions given, and general verdicts returned, we cannot determine beyond a reasonable doubt whether the jury found that the defendants conspired with an intent to kill." (*Id.* at p. 596.) In *Swain*, the jury was instructed on the elements of murder, including the principles of implied malice second degree murder; however, the court concluded that the implied malice theory could not support a conviction of conspiracy. Moreover, the prosecutor "repeatedly referred to implied malice in the closing arguments, stating at one point that ' . . . this could very easily be an implied malice case.'" (*Id.* at p. 607.) Thus, we find *Swain* distinguishable on its facts and not helpful to defendant's argument.

We find no error in the instructions on the express malice element of attempted murder.

F. Section 654

Defendant contends that section 654 prohibits separate punishments for shooting into an occupied motor vehicle and attempted murder. The People concede that defendant's sentence for shooting into an occupied motor vehicle must be stayed because defendant's conviction arose from the same indivisible course of conduct as the attempted murders. (*People v. Duarte* (1984) 161 Cal.App.3d 438, 446.)

IV. DISPOSITION

Defendant's sentence for shooting into an occupied motor vehicle is ordered stayed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

WARD
J.